No. 82-1987

In the Supreme Court of the United States

OCTOBER TERM, 1983

MONSOUR FERRIS, a/k/a MONTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the use of a two-question verdict form, to which petitioner consented, was plain error.

2. Whether evidence showing the existence and scope of a gambling business that petitioner was charged with aiding and abetting was properly admitted at trial.

3. Whether petitioner was entitled to an evidentiary hearing on the veracity of the affidavit submitted in support of a wiretap application.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A56) is reported at 700 F.2d 1. The opinion of the district court denying petitioner's request for a *Franks* v. *Delaware*[1] hearing is reported at 507 F. Supp. 761.

JURISDICTION

The judgment of the court of appeals (Pet. App. A57) was entered on January 28,1983. A petition for rehearing was denied on March 30, 1983. The petition for a writ of certiorari was filed on May 26, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]438 U.S. 154 (1978).

STATEMENT

Following a jury trial in the United States District Court for the District of Rhode Island, petitioner was convicted of aiding and abetting co-defendant John Brian,[2] who was engaged in the business of betting and wagering, by using a telephone to transmit interstate information assisting in the placing of bets and wagers, in violation of 18 U.S.C. 1084(a)(2). He was fined $7,000. The court of appeals affirmed (Pet. App. A1-A56).

1. The evidence at trial showed that petitioner owned a restaurant in Fall River, Massachusetts, from which he wagered on sporting events. Through several bookmakers, he also placed bets for John Brian, who ran a nationwide sports betting business from his home in Providence, Rhode Island. In December 1977, the two men discussed sports betting over the telephone in 11 separate calls. An example illustrates the usual process. On December 9, 1977, Brian telephoned petitioner to find out if petitioner had a new bookmaker and asked petitioner to place bets for him on two basketball games. Brian dictated the terms of the bets and directed petitioner to find a bookmaker who was quoting a point spread acceptable to Brian (Tr. 56-58, 118, 120-123, 147-148). Two days later, petitioner informed Brian of the point spread his bookmaker was offering on a professional football game. Brian instructed petitioner to bet as much as possible on the game. Within ten minutes,

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[2]Brian was tried separately on stipulated facts and was convicted of conducting an illegal gambling business, in violation of 18 U.S.C. 1955. Pursuant to an agreement with the government, the remaining charges against Brian were dismissed, including the count on which petitioner was tried and convicted.

In all, 16 defendants were named in the 13-count indictment that charged various violations of the federal gambling laws. Petitioner was granted a severance and was tried alone. Twelve of his co-defendants were also convicted on at least one count each.

petitioner reported that he had placed a $3,000 bet on Brian's behalf and that the bookmaker would charge a $300 fee if Brian lost the wager (Tr. 57-58, 62-63).

Petitioner also settled with bookmakers on Brian's behalf. On December 12, 1977, Brian called petitioner and asked if petitioner had settled yet with one of his bookmakers and whether he had collected $800 for Brian from Pierre, another bookmaker. Petitioner assured Brian that one of the bookmakers would settle with them that day. Brian then instructed petitioner to place a bet for him on two horses with yet a third bookmaker. Petitioner complied, and bet an equal amount on the horses for himself. When the horses lost, petitioner and Brian divided the loss evenly (Tr. 50-56).

2. Most of the evidence introduced at trial was obtained by court authorized interceptions of three Providence, Rhode Island telephones. Two phone numbers were used by Brian; the third was used by his employee, co-defendant Harry Kachougian. Evidence set forth in an affidavit by FBI Agent Robert Conley provided probable cause for authorizing electronic surveillance. The affidavit recited information provided by five confidential informants regarding the gambling activities of Brian, Kachougian and the other target defendants.[3] Three of the five claimed to have placed bets with Brian's operation. In addition to the information provided by the five informants, a local police officer conducted surveillance of Brian during five betting hours on 23 days. In each instance he observed Brian at the location of the telephone allegedly used by Brian to accept and place wagers. The affidavit also included toll records from the three telephones suspected of being used in Brian's and Kachougian's business. These toll records showed frequent calls from Rhode Island to target defendants located in other states. In addition, the affidavit recited the criminal records of some of the suspects.

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[3]Petitioner was not one of the target defendants.

Petitioner and his co-defendants moved to suppress the intercepted conversations, alleging inaccuracies in Agent Conley's affidavit. First, they claimed that there were no unidentified callers in the more than 600 gambling related telephone conversations that were intercepted by the tap. Accordingly, they alleged, the five confidential informants could not exist. Second, they supplied affidavits by several of the target defendants, including Brian and Kachougian, who generally denied that they had ever accepted or placed wagers or otherwise discussed gambling with anyone.[4] Petitioner and his co-defendants requested a hearing on their motion, pursuant to *Franks* v. *Delaware*, 438 U.S. 154 (1958), in which they hoped to impugn Agent Conley's veracity.

3. The district court held that the affidavits did not establish petitioner's right to a *Franks* v. *Delaware* hearing. 507 F. Supp. at 763. The court noted that petitioner was required to make a substantial preliminary showing that the affiant made a false statement "knowingly and intentionally or with reckless disregard for the truth." *Id.* at 764. It then found that the affidavits "do not sufficiently implicate Agent Conley's veracity. Assuming the truth of what defendants state, their offer of proof at best impugns *either* the veracity of the informants *or* the veracity of Conley." *Ibid.* The court thus concluded that petitioner did not sufficiently demonstrate that Conley acted with a reckless disregard for the truth to warrant a hearing. *Ibid.*

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[4]Brian submitted an affidavit generally denying that he had conversed with anyone about anything mentioned in the Conley affidavit. Brian also averred, "[a]t no time has anyone placed bets with him anywhere * * *." C.A. App. 412. Similarly, Brian's son, Robert Baborian, claimed in an affidavit that he "never told anyone" anything that would implicate him in the gambling operation. C.A. App. 413-414. Kachougian contended that he used the name "Tom" rather than "Harry" in his business and denied that he ever used the phone number named in the affidavit for intrastate betting. That number, he claimed, was known only to his "blood relatives." Kachougian C.A. App. A-7.

Nor was the court persuaded by petitioner's allegation that the informants could not have bet with Brian and Kachougian because the "actual interceptions fail to show any 'unidentified callers' " (507 F. Supp. at 765):

> Defendants have not eliminated the possibility that the informants were good friends of theirs, were fellow defendants in this case, or that the Government does not delete names of informants who made calls during wire interceptions.

Nevertheless, the district court examined Agent Conley in camera to satisfy itself that the five confidential informants mentioned in Conley's affidavit did in fact exist. Pet. App. A14-A15. At the same time, the government submitted to the court a list of 48 intercepted conversations in which at least one of the parties was not identified. On the basis of the government's uncontroverted tally and Agent Conley's in camera testimony, the court found that there were numerous unidentified callers on the tap. The court remarked that this fact alone "undercut much of the need for the in camera interview." *Id.* at A15 n.8. After questioning Agent Conley, the court was fully satisfied that petitioner's "concerns about the affidavit [were] unfounded." *Id.* at A14 n.8.

4. The court of appeals affirmed petitioner's conviction and the ruling of the district court denying petitioner's request for a *Franks* v. *Delaware* hearing. Pet. App. A1-A56. After reviewing the record, the court upheld the district court's finding that there were unidentified callers on the wiretap. Pet. App. A8-A9. Accordingly, there was no basis for discrediting the statements in Agent Conley's affidavit that three of five confidential informants had placed bets with Brian and Kachougian. *Ibid.* With respect to the counter-affidavits provided by the defendants denying that they had made any of the statements attributed to them by Conley's informants, the court of appeals held that petitioner and his co-defendants had failed to make the " 'substantial preliminary showing' " required by *Franks* that

Agent Conley rather than the informants had lied in the affidavit. *Id.* at A11-A12. Finally, the court of appeals upheld the district court's use of an in camera hearing to "protect the fourth amendment rights of defendants while keeping the identity of the informants secret." *Id.* at A13. On the basis of the defendants' proffer, they were not entitled to a full adversary hearing. *Id.* at A14.

ARGUMENT

1. Petitioner contends (Pet. 7-12) that the district court committed plain error when it submitted to the jury a verdict form that, in essence, asked whether petitioner was guilty as a principal, and if not, whether petitioner was guilty as an aider and abettor.[5] The district court gave petitioner ample opportunity to object to the form (Tr. 231):

> I want you to take a look at that verdict sheet to see if you all agree that the verdict sheet is okay. If not, I can always revise it before sending it in.

Petitioner's counsel replied (Tr. 231-232):

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[5]The questions on the verdict form are as follows:

> 1. Do you find the defendant guilty or not guilty of violating 18 U.S.C. §1084—that is, of engaging in the business of betting and wagering as recited in the statute which the Court has read to you and on which you have been instructed?
>
> _____
>
> (State "guilty" or "not guilty" as you find)
>
> You answer Question No. 2 only if you find the defendant not guilty of the offense as set forth in Question No. 1 above.
>
> 2. Do you find the defendant guilty or not guilty of aiding and abetting in violation of 18 U.S.C. §1084—that is of engaging in the business of betting and wagering as recited in the statute which the Court has read to you and on which you have been instructed?
>
> _____
>
> (State "guilty" or "not guilty" as you find)

> The verdict sheet is satisfactory to both sides, your Honor. * * * [It is] satisfactory to the defendant, your Honor.

He consented to the form as a matter of strategy. One of petitioner's primary contentions in both courts below was that the aiding and abetting statute, 18 U.S.C. 2, could not be applied to a Section 1084(a) violation. Pet. App. A29-A33. The purpose of the divided verdict form was to clarify whether the jury found that petitioner was in the business of betting and wagering or whether it found that John Brian was in such a business and that petitioner aided and abetted Brian in the commission of a Section 1084 offense. The jury took the latter position and acquitted petitioner as a principal. The verdict form therefore helped clarify the record for the purpose of litigating petitioner's challenge to the applicability of the aiding and abetting statute on appeal.

In addition to raising the aiding and abetting issue on appeal, however, petitioner argued that the divided verdict form was plain error. See Fed. R. Crim. P. 52(b). The court of appeals concluded that the divided form should not have been used. Pet. App. A24. But, because petitioner gave the form "his stamp of approval," the court remarked that the "only question [was] whether the use of the form amounted to plain error * * *." *Ibid.* The court correctly found that it did not.[6]

However, in an infelicitous choice of words, the court commented (Pet. App. A24; footnote omitted) that "[i]f [petitioner] had objected to the use of the verdict form, we might be inclined to view its use as plain error." Seizing

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[6]Petitioner implies (Pet. 9) that the court of appeals found that the same verdict form was plain error in the trial of co-defendant Lester Banker. This is not so. Banker objected to the form and the form was not used (see Pet. App. A-24 n.16). Thus, the plain error question did not arise in Banker's appeal to the First Circuit.

upon this language, petitioner points out that Rule 52(b) allows a court to notice plain errors—those "affecting substantial rights"—even if "they were not brought to the attention of the court." In our view, however, the two-question verdict form was not error, plain or otherwise.

There is no constitutional right to a general verdict. *United States* v. *O'Looney*, 544 F.2d 385, 392 n.5 (9th Cir.), cert. denied, 429 U.S. 1023 (1976); *Heald* v. *Mullaney*, 505 F.2d 1241, 1245 (1st Cir. 1974), cert. denied, 420 U.S. 955 (1975). Consequently, special verdicts are not error per se. *Heald* v. *Mullaney, supra*. Indeed, in some instances, a special verdict with special interrogatories is preferable or even necessary. See, *e.g., Kawakita* v. *United States*, 343 U.S. 717, 737 (1952); *United States* v. *Palmeri*, 630 F.2d 192, 202-203 (3d Cir. 1980), cert. denied, 450 U.S. 967 (1981); *United States* v. *Huber*, 603 F.2d 387, 396 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980); *United States* v. *Stassi*, 544 F.2d 579, 583 (2d Cir. 1976), cert. denied, 430 U.S. 907 (1977). A special verdict is error only where it has the effect of leading the jury inevitably to a finding of guilt (see, *e.g., United States* v. *Spock*, 416 F.2d 165, 181-182 (1st Cir. 1969) (the verdict on a single count was subdivided into ten questions)), where it shifts the burden of proof (*United States* v. *Wilson*, 629 F.2d 439, 441 (6th Cir. 1980)), or where it entirely removes the question of guilt from the jury (*United States* v. *Bosch*, 505 F.2d 78, 80-83 (5th Cir. 1974)).

Here, the verdict form had none of these effects. It simply asked the jury to consider separately whether or not petitioner was guilty as a principal, and whether or not he was guilty as an aider and abettor. In this respect, it merely reflected the court's charge to the jury (see Tr. 213-217). There is ample evidence to support the jury's verdict that

petitioner aided and abetted Brian's sports betting business, and in these circumstances, there was no error.[7]

2. Both courts below correctly rejected petitioner's claim (Pet. 12-19) that evidence establishing that John Brian was in the sports betting business was improperly admitted at trial. Pet. App. A16-A18; Tr. 17, 26-28. Petitioner was charged with aiding and abetting a violation of 18 U.S.C. 1084(a), which provides (emphasis added):

> *Whoever being engaged in the business of betting or wagering* knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

The government's theory was that John Brian was in the "business of betting or wagering" by operating a nationwide sports betting business and that petitioner aided and abetted Brian by placing lay-off wagers on Brian's behalf. In order to convict petitioner, the government had to prove that Brian was in the sports betting business. It did so in the "best and simplest way" (Pet. App. A18), by introducing taped conversations between Brian and several of his gambling colleagues, including his employee Kachougian, and

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[7]To the extent that the wording on the bifurcated form could have been improved (see Pet. 11), petitioner should have proffered a timely alternative suggestion. But when the verdict form is read "together with the entire jury charge" (*United States* v. *Desmond*, 670 F.2d 414, 418 (3d Cir. 1982)), it was sufficiently clear that petitioner's substantial rights were not affected by the choice of words.

by introducing the gambling records seized from Brian's and Kachougian's homes. The district court instructed the jury that this evidence was introduced solely to show that Brian was in the business of betting and wagering; it was not admitted to show petitioner's involvement in the offense (Tr. 17-18, 215). Moreover, the jury was instructed (Tr. 214) that it must first decide whether Brian was in the business of betting and wagering before considering whether petitioner aided and abetted Brian. In these circumstances, the probative value of the evidence clearly outweighed its prejudicial impact. See Fed. R. Evid. 403.

Furthermore, petitioner errs (Pet. 18) when he characterizes the evidence as "rank hearsay." The taped conversations between Brian and his customers and employees were not introduced to prove the truth of the matters asserted; rather they were verbal acts and hence admissible under Fed. R. Evid. 801(c). See *Lutwak* v. *United States*, 344 U.S. 604, 617-619 (1953); *United States* v. *Boyd*, 566 F.2d 929, 936 (5th Cir. 1978). In short, there was no basis for excluding this necessary evidence.

3. Finally, petitioner incorrectly contends (Pet. 19-29) that he was entitled to an evidentiary hearing on his motion to suppress so that he could challenge the veracity of Agent Conley, the affiant in the wiretap application. There is "a presumption of validity with respect to the affidavit supporting the search warrant." *Franks* v. *Delaware*, 438 U.S. 154, 171 (1978). To obtain an evidentiary hearing, petitioner was required to make "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant." *Id.* at 155-156. After carefully considering the proffer of petitioner and his co-defendants, both courts below correctly found that petitioner had failed to make the required preliminary showing. Pet. App. A5-A15; 507 F. Supp. at 763-765. Accordingly, he was not entitled to a *Franks* hearing.

As petitioner admits (Pet. 22), in order to secure a hearing, a defendant's offer of proof must show that any factual errors in the affidavit were the fault of the affiant rather than his informants. But here, the offer of proof submitted by petitioner and his co-defendants did not meet that burden. Instead, the counter-affidavits submitted by the defense simply denied that the target defendants had ever made any of the statements attributed to them by the informants. For instance, in one counter-affidavit, Brian broadly denied that he ever told anyone about his gambling operation or that he ever accepted bets from anyone. Brian C.A. App. 75-77. Brian thereby attempted to contradict several of the informants who claimed to have placed bets with him. But even if Brian's affidavit is accepted as true, it merely shows that these informants lied to Agent Conley and not that Agent Conley lied. This is, of course, altogether different from the situation in *Franks*, where the attack was squarely on the veracity of the affiant. Indeed, this was one of the bases upon which the Court distinguished *Franks* from *Rugendorf* v. *United States*, 376 U.S. 528, 532-533 (1964) ("erroneous statements * * * were not those of the affiant" and "fail[ed] to show that the affiant was in bad faith"). 438 U.S. at 163.

In any event, Brian's bare denials were so unworthy of belief that they did not raise a serious issue of fact. Of more than 1,000 intercepted telephone calls on Brian's and Kachougian's phones, 610 related to gambling. Thus, the district court had no reason to accept at face value Brian's statement that he never discussed gambling with anyone. The remaining affidavits submitted by the defendants were similar to the Brian affidavit (see page 4 note 4, *supra*), and likewise did not support petitioner's request for a *Franks* hearing.

Nor was petitioner entitled to a hearing because he inaccurately alleged that there were no unidentified parties to the telephone calls that were intercepted after the wiretap order was entered. According to petitioner, a lack of unidentified callers would tend to show that Agent Conley had fabricated the existence of three of the five informants. But as both courts below found, there were at least 48 unidentified parties. Moreover, as the district court observed, the informants may have been "fellow defendants in this case," or some of the identified callers may have been confidential informants. 507 F. Supp. at 765.[8] In sum, there was no factual support for petitioner's allegation that Agent Conley created the informants out of whole cloth.

Petitioner complains also (Pet. 23-29) that the district court conducted an in camera hearing with Agent Conley instead of an adversary hearing. But the in camera hearing itself was more than petitioner was entitled to, and therefore there was no error. As we have shown, petitioner did not make the necessary threshold showing to warrant a full *Franks* hearing. The in camera proceeding was prompted by petitioner's unfounded and erroneous allegation that there were no unidentified callers on the tap. Once the government disproved this allegation by submitting to the court the wiretap records, the need for the *in camera* hearing was obviated. See Pet. App. A15 n.8. The purpose of the hearing was simply to satisfy the district court that the confidential informants did exist without disclosing their names. As this Court held in *Franks* v. *Delaware*, *supra*, 438 U.S. at 167, even where a defendant attempts to discredit an affiant who based his warrant application on "tips

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[8]Because petitioner sought to attack the veracity of the affidavit by relying on the identities of callers whose conversations were subsequently intercepted, another possibility exists: that the informants made no calls after the wiretap order was implemented.

received from unnamed informants," the informant's identity will be "properly protected from revelation." Cf. *United States* v. *Raddatz*, 447 U.S. 667, 679 (1980); *McCray* v. *Illinois*, 386 U.S. 300 (1967). Thus, the district court did not err in refusing to conduct an adversary hearing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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